

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

SHAWN ASHFORD,

Appellant,

v.

DIVISION OF EMPLOYMENT SECURITY,

Respondent.

DOCKET NUMBER WD73162

Date: December 20, 2011

Appeal from:
Labor and Industrial Relations Commission Circuit Court

Appellate Judges:
Division One: Alok Ahuja, P.J., Thomas H. Newton and James E. Welsh, JJ.

Attorneys:
Leah B. Williamson, Jefferson City, MO, for appellant.
Michael R. Rinard, II, St. Joseph, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

SHAWN ASHFORD

Appellant,

v.

DIVISION OF EMPLOYMENT SECURITY,

Respondent.

WD73162

Labor and Industrial Relations Commission

Appellant Shawn Ashford worked as a forklift operator for Triumph Foods from September 16, 2008, until May 22, 2009. On approximately April 22, 2009, Ashford violated Triumph's substance abuse policy and was offered two choices: resign or participate in an alcohol rehabilitation program. He chose the latter, and signed a rehabilitation agreement with Triumph.

On May 22, 2009, Ashford was scheduled to work from 10:30 p.m. to 6:00 a.m. Soon after reporting to work, he argued with co-workers. Based on a suspicion that Ashford's behavior was caused by substance abuse, he was taken to the health services department, and given a breathalyzer test. The breathalyzer revealed that Ashford's blood-alcohol concentration was .06. As a result, Triumph discharged him.

Ashford filed a claim for unemployment benefits, which Triumph protested. The Commission ultimately determined that Ashford was disqualified from receiving unemployment benefits because he had been discharged for misconduct connected with his work. The Commission found that, when he entered the rehabilitation program, Ashford agreed "to come to work without any alcohol in his system." Because Ashford had a detectable amount of alcohol in his system on May 22, 2009, Ashford had violated his agreement, without regard to whether he was in fact "completely sober" at the time, as he claimed in his testimony. Ashford appeals.

REVERSED AND REMANDED.

Division One holds:

The Commission's conclusion that Ashford had been discharged for misconduct hinges on its factual finding that Ashford had agreed not to arrive at work with any detectable alcohol in his system. That finding is not supported by substantial and competent evidence, however. Instead, the testimony of the witnesses indicates that Ashford's rehabilitation agreement either prevented him only from consuming alcoholic beverages at work, or that it prohibited him from

arriving at work with a certain (although unspecified) blood-alcohol level. None of the evidence in the record indicates that the rehabilitation agreement adopted a “zero-tolerance” policy.

Because it is based on an unsupported factual finding as to the terms of Ashford’s rehabilitation agreement, the Commission’s decision must be reversed. The employer’s representative testified that the employer’s substance abuse policy, applicable to all employees and contained in the employee handbook, prohibited workers from arriving at work “under the influence” of alcohol. The Commission made no finding in this case, however, as to whether Ashford was “under the influence during his evening shift on May 22, 2009. The case is accordingly remanded for the Commission to make necessary findings, on the basis of the existing record, as to whether Ashford committed misconduct by appearing at work “under the influence” of alcohol.

Before: Division One: Alok Ahuja, P.J., Thomas H. Newton and James E. Welsh, JJ.

Opinion by: Alok Ahuja, Judge

December 20, 2011

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